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In the Supreme Court of the United States

OCTOBER TERM, 1992

BROWN & ROOT, INC., *Petitioner*

v.

STEPHEN A. MISTICH, *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, State of Louisiana

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

As we explained at greater length in our petition, the state and federal courts are sharply divided on whether a Jones Act seaman may recover punitive damages in an unseaworthiness action under the general maritime law. The Louisiana Court of Appeal, following the Fifth Circuit's decision in *In Re Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981), held that punitive damages *are* available, and therefore affirmed a $4 million award against petitioner. Several other state and federal courts have taken the same view – including a decision only three weeks ago awarding a Jones Act seaman $10 million in punitive damages in a

general maritime law action in Texas state court.[1] By contrast, the Sixth Circuit in *Miller* v. *American President Lines, Ltd.*, Nos. 91-3602/3837 (Mar. 23, 1993), relying on this Court's decision in *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (6th Cir. 1990), squarely rejected the availability of punitive damages in a seaman's unseaworthiness action. Numerous other federal courts have taken this contrary view. See Pet. 7 n.5. The present case is a most appropriate vehicle for resolving the conflict.

Respondent opposes a grant of certiorari in three principal ways – first, by misconstruing the question presented; next, by papering over the conflict among the lower courts; and finally, by defending punitive damages on policy grounds. As we show below, none of these efforts is successful.[2]

1. Respondent devotes much of his brief to a question that is simply not at issue in the case. Indeed, at the very outset of his brief, respondent reformulates the question presented: in contrast to the petition itself – which asks "[w]hether punitive damages are available under the general maritime law in *a seaman's* unseaworthiness action *against his employer*" (Pet. i) – respondent addresses the much broader (but irrelevant) question whether punitive damages

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[1] *Cockerham* v. *Diamond M Co.*, No. 65,405 (Tex. Dist. Ct. May 8, 1993).

[2] Respondent also devotes a portion of his brief to a somewhat partisan factual presentation. While we do not propose to debate the evidence, we do wish to note that petitioner offered a very different factual account at trial. Petitioner presented evidence showing that both it and the companies that provided x-ray services properly monitored the pipelaying barges for exposure to radiation, and ensured that radiation did not exceed permissible levels. Petitioner also offered evidence that tended to negate any causal link between radiation exposure on its barges and respondent's disease.

are available in *any* setting under the general maritime law (Opp. i).

Respondent's reformulation misdirects the eye. We do not dispute that, where the facts warrant, punitive damages may be awarded under the general maritime law in cases that do not involve Jones Act seamen.[3] The question in this case, however, is whether a Jones Act seaman may sue his employer for punitive damages. It is *that* question on which the federal and state courts have divided, and to which the cases on which respondent relies do not speak. And it is that question, and only that question, on which petitioner seeks further review by this Court.

2. Respondent asserts (Opp. 4) that "[t]he well-recognized standard for imposing punitive damages was, and still is, set forth in *In re Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981)." He contends, moreover, that the Sixth Circuit's *Miller* case is not in conflict with *Merry Shipping* (and the decision below) because, in contrast to the latter

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[3] Thus, we do not quarrel with respondent's unremarkable suggestion that "[a]s early as 1818" this Court recognized the availability of punitive damages under the general maritime law. Opp. 4. We note in passing, however, that in *The Amiable Nancy*, 16 U.S. (3 Wheat) 546 (1818), the Court did *not*, as respondent mistakenly asserts (Opp. 4), "award[] punitive damages under general maritime law" (*ibid.*). The Court merely stated, in dictum, that such damages might be available in an appropriate case. Moreover, *The Amiable Nancy* was an action for marine trespass, not a claim by a seaman against his employer. Many of the other cases cited by respondent likewise involved claims by plaintiffs who were not the defendant's employees. See *Muratore* v. *M/S SCOTIA PRINCE*, 845 F.2d 347 (1st Cir. 1988) (action by cruise ship passengers for intentional infliction of emotional distress); *Protectus Alpha Navigation Co., Ltd.* v. *North Pac. Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985) (action by vessel owner against land-based grain terminal owner for negligence in fighting fire); *Duplantis* v. *Texaco*, 771 F. Supp. 787 (E.D. La. 1991) (action for negligent maintenance of underwater equipment); *CEH, Inc.* v. *F/V Seafarer*, No. 92-0389L, 1993 WL 156902 (D.R.I. May 13, 1993) (action for damage to fishing equipment).

cases, *Miller* "did not involve the issue of whether an employer's behavior was willful and wanton in disregarding the safety of its workers" (Opp. 12). In respondent's view, "[g]eneral maritime law claims for punitive damages due to willful and wanton misconduct are * * * different from general maritime law and Jones Act claims for damages due to unseaworthiness and negligence" (Opp. 3).

Respondent's distinction is baseless. In *Miller* – as in *Merry Shipping* and in the present case – the plaintiff alleged that the defendant had wantonly and willfully caused unseaworthy conditions. As the Sixth Circuit explained, the district court in *Miller* awarded punitive damages based on a showing of "willful and wanton misconduct under the general maritime law of unseaworthiness." Slip op. at 14. Thus, respondent is simply mistaken in suggesting (Opp. 12) that "*Miller*, unlike the instant case, did not involve the issue of whether an employer's behavior was willful and wanton in disregarding the safety of its workers."

More generally, the distinction that respondent propounds (Opp. 3) – between claims for "willful and wanton misconduct," on the one hand, and "damages due to unseaworthiness" on the other – is illusory. Willful misconduct and unseaworthiness are not alternative claims. They are separate elements of a claim for punitive damages. In particular, a plaintiff will typically assert that because the defendant has "willfully and wantonly" created an "unseaworthy" condition, punitive damages should be awarded.

Merry Shipping itself involved such a claim. In that case, the Fifth Circuit explicitly held that "punitive damages may be recovered under general maritime law upon a showing of willful and wanton misconduct by the shipowner in the creation or maintenance of unseaworthy conditions." 650 F.2d at 623. After discussing the purposes of punitive damages and the types of actions that justify their award, the

court reiterated the point: "Punitive damages should be available when a shipowner has willfully violated the duty to furnish and maintain a seaworthy vessel." *Id.* at 625.

The Louisiana Court of Appeal made the same point in this case. Although respondent contends that the award of punitive damages in this case "is based not on unseaworthiness, but on a general maritime law claim for willful and wanton misconduct," the Court of Appeal clearly understood otherwise. Relying on *Merry Shipping*, the court stated that petitioner's "willful and wanton misconduct" constituted a breach of "its duty to furnish and maintain seaworthy vessels." Pet. App. 25a (emphasis added).[4]

There is, in short, no plausible distinction between *Merry Shipping* and its progeny (including the decision below) and the Sixth Circuit's decision in *Miller*. The decisions are clearly in conflict, and review by this Court is warranted.[5]

3. As we explained in the petition (Pet. 11-14), the ruling sought by petitioner in this case would almost certainly resolve the conflict among the lower federal courts and state courts concerning the availability of punitive damages in actions brought by seamen against their employers for failure to pay maintenance and cure. Respondent contends, however, that the "[f]ederal courts are united" (Opp. 11) on this point, and thus there is no conflict to resolve. That is not so.

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[4] Not surprisingly, in explaining why punitive damages were warranted in this case, the Court of Appeal pointed to the same evidence that it had identified in upholding the finding of unseaworthiness. See Pet. App. 8a-13a.

[5] Respondent ignores altogether the decisions of the Ninth Circuit, which has tried to steer a middle course on the question of punitive damages. See Pet. 9-10.

First, respondent misstates the Second Circuit's ruling in *Kraljic* v. *Berman Enters., Inc.*, 575 F.2d 412 (2nd Cir. 1978). *Kraljic* holds that punitive damages may *never* be awarded to a Jones Act seaman, over and above the award of counsel fees. The court of appeals did not, as respondent mistakenly suggests, limit its holding simply to "some cases" or to "the facts of that case" (Opp. 12). Nor did the Second Circuit suggest, even obliquely, that "additional punitives may be available if the employer's failure to pay maintenance and cure aggravates a seamen's condition" (*ibid.*). It is therefore not surprising that the Eleventh Circuit, in its more recent decision in *Hines* v. *J.A. Laporte, Inc.*, 820 F.2d 1187 (1987), noted that the "Circuits are divided" on the question whether punitive damages are available for failure to pay maintenance and cure. *Id.* at 1189.

Second, respondent ignores the very recent district court decisions, noted in our petition (at 13-14 n.11), that have taken conflicting positions on the question. These cases, as we noted, include two courts within the same federal district. Compare *Ridenour* v. *Holland Am. Line Westours, Inc.*, 806 F. Supp. 910 (W.D. Wash. 1992) (punitive damages are available in a general maritime law action for failure to pay maintenance and cure), and *Nelsen* v. *Research Corp. of Univ. of Hawaii*, 805 F. Supp. 837 (D. Haw. 1992) (same), with *La Voie* v. *Kualoa Ranch & Activity Club, Inc.*, 797 F. Supp. 827 (D. Haw. 1992) (punitive damages are not available).[6]

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[6] As we noted in the petition (Pet. 14), the present case does not itself involve a claim for maintenance and cure. Respondent contends that this Court would therefore be issuing an "advisory opinion" were it to address the question. But we are not asking the Court to *rule* on the question of maintenance and cure; we simply submit that the ruling we seek on the question presented will likely resolve the closely related question on maintenance and cure. There is nothing unusual, let alone unconstitutional, about granting review in part because a decision by this Court will clarify an area of law that is somewhat broader than the

4. Respondent asserts at several points (Opp. 5, 10) that *Miles* has no bearing on this case because it deals only with damages for loss of society, and not punitive damages. We do not contend, however, that *Miles directly* addresses the question presented. Rather, we contend that the *approach* taken in *Miles* applies here as well. Here, as in *Miles*, the question presented is whether a Jones Act seaman (or his survivor) may recover a type of damages that is not available under a parallel federal statute. Just as this Court held in *Miles* that the survivor of a Jones Act seaman may not recover for loss of society because such damages are not available under parallel statutes, so too should the court below have looked to a parallel statute (the Jones Act) in deciding whether punitive damages are available to a Jones Act seaman.

Respondent does not suggest that punitive damages are available under the Jones Act itself. He does contend, however, that punitive damages have been available under the general maritime law for "almost 200 years," and that if *Miles* is read as petitioner believes it should be, the case would "nullif[y] the entire body of general maritime law" (Opp. 5, 9). Again, however, respondent misapprehends the question presented in this case. We do not contend that *Miles* forecloses punitive damages in *all* cases under the general maritime law. Indeed, *Miles* cannot plausibly be read that broadly.[7] The question in this case, however – and the

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particular question presented.

[7] As we explained at greater length in the petition, the pecuniary damage limitation in *Miles* applies only in those lawsuits that are subject to parallel coverage under a particular federal statute. Thus, for example, where the Jones Act does not apply for one reason or another, post-*Miles* decisions have held that plaintiffs suing under the general maritime law are not limited solely to pecuniary damages. See, *e.g.*, *Garner* v. *Dravo Basic Materials Co.*, 768 F. Supp. 192 (S.D. W. Va. 1991) (parents of non-seaman who died in territorial waters could recover lost future

question to which the approach in *Miles* clearly applies – is whether a *Jones Act seaman* can recover punitive damages under the general maritime law in an unseaworthiness action *against his employer*. To answer that question as we believe it should be answered, this Court will not have to reconsider *any* of its prior decisions, let alone "nullify" the "almost 200 years" of its admiralty jurisprudence.[8]

5. Finally, respondent defends the decision below on a variety of policy grounds (Opp. 13-14). He argues, for example, that "[p]unitive damages are wholly a product of judicial decision-making, fashioned on the basis of tradition and policy long pre-dating the Jones Act" (Opp. 13). But that is exactly the kind of free-wheeling judicial authority that *Miles* forecloses. As the Court explained in *Miles*: "It would be inconsistent with [a court's] place in the constitutional scheme * * * to sanction more expansive remedies in a judicially-created cause of action in which liability is without fault than Congress has allowed in cases of death from negligence." 498 U.S. at 32-33.

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earnings, a measure of damages excluded under the Jones Act); *Sugden* v. *Puget Sound Tug & Barge Co.*, 796 F. Supp. 455 (W.D. Wash. 1992) (because Jones Act does not give seaman or representatives a cause of action against non-employers, family members could recover non-pecuniary damages in general maritime law action against shipyard that was not seamen's employer).

[8] *Miles* cannot be taken, as respondent implies (Opp. 5), as having somehow endorsed the availability of punitive damages to Jones Act seamen. The Court simply had no occasion in *Miles* "expressly" to address the availability of punitive damages. The plaintiff in *Miles* did *not* recover punitive damages in the trial court, and, after reviewing the evidence, the court of appeals agreed that there was insufficient evidence to warrant an award of punitive damages. *Miles* v. *Melrose*, 882 F.2d 976, 989 (5th Cir. 1989), aff'd in other grounds 498 U.S. 19 (1990). Not surprisingly, therefore, the petition to this Court for a writ of certiorari in *Miles* did not include any reference to the issue of punitive damages.

Respondent also contends (Opp. 14) that punitive damages are "the only mechanism available to compel companies like Brown & Root to make necessary and life-saving changes, which would otherwise be ignored." As an empirical matter, that is probably not so, in view of the deterrent impact of large compensatory awards – such as the award in this case.[9] In any event, even if courts were otherwise inclined to embrace punitive damages on policy grounds, they are not free to do so. Under *Miles*, courts must "look primarily to * * * legislative enactments for policy guidance." 498 U.S. at 27. Because Congress has foreclosed Jones Act seamen from recovering punitive damages in actions against their employers, courts are not free – on deterrence grounds, or any other – to award punitive damages under the general maritime law.

CONCLUSION

For the foregoing reasons, and the reasons stated in our petition, the petition for a writ of certiorari should be granted.

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[9] See, *e.g.*, Richard A. Posner, ECONOMIC ANALYSIS OF LAW 176-177, 191-195 (3rd ed. 1986); Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U.L. REV. 395 (1991).

Respectfully submitted.

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